

February 26, 1990

MEMORANDUM

TO: The Honorable Robert A. Alm
Director of Commerce and Consumer Affairs

ATTN: Noe Noe Tom, Administrator
Professional and Vocational Licensing Division

FROM: Hugh R. Jones, Staff Attorney

SUBJECT: Legislative Access to Professional and Vocational
Licensing Application Data

This is in reply to your letter dated November 21, 1989, requesting an advisory opinion concerning legislative access to professional and vocational licensing application data.

ISSUES PRESENTED

I. Whether under the Uniform Information Practices Act (Modified) ("UIPA"), chapter 92F, Hawaii Revised Statutes, the Department of Commerce and Consumer Affairs ("DCCA") must permit the public to inspect and copy those portions of a professional or vocational license application which reveal a licensee's home address, home telephone number, and date of birth.

II. Whether an agency may disclose records protected under Part II of the UIPA to individual legislators, under section 92F-19(a)(6), Hawaii Revised Statutes.

BRIEF ANSWERS

The disclosure of an individual licensee's or license applicant's home address, home telephone number, and date of birth, as contained in their license application, would

"constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Based upon previous Office of Information Practices' ("OIP") advisory opinions, individuals have a significant privacy interest in this information. Further, the disclosure of this information would say little, if anything, concerning "what the government is up to" or about the conduct of public officials. Under these circumstances, therefore, an individual's privacy interest in such information is not outweighed by the public interest in disclosure.

Further, based upon the legislative history of similar provisions of the Privacy Act of 1974, 5 U.S.C. . 552a (Supp. 1989), and case law interpreting the same, we conclude that section 92F-19(a)(6), Hawaii Revised Statutes, does not authorize the disclosure of government records protected under part II of the UIPA to legislators when acting in their individual capacities. Rather, this UIPA provision permits disclosure of government records to the Legislature or committees thereof, in connection with the transaction of business before those bodies, when acting as a whole.

FACTS

The DCCA's Division of Professional and Vocational Licensing ("Division") provides administrative and advisory services to the various boards and commissions that are within the DCCA. The Division also prepares and scores some, but not all, licensing examinations, and issues or renews the licenses of qualified applicants.

Recently, two members of the Hawaii State Senate separately requested all information maintained by the DCCA concerning a corporation issued a license by the DCCA to perform massage and its "principal massage therapist," who according to DCCA rules, must also be licensed to practice massage. See sections 16-84-11 and 16-84-15, Hawaii Administrative Rules. In response to this request, the DCCA provided the two senators with the name of the organization and its "principal massage therapist," their business addresses, type of license held, and the status of the corporation's and principal therapist's licenses, as required by section 92F-12 (a)(13), Hawaii Revised Statutes. However, the DCCA did not provide the legislators with the home address, home telephone number, and date of birth of the organization's "principal

massage therapist." The DCCA seeks an advisory opinion concerning whether this information is subject to public inspection under part II of the UIPA, and if not, whether the requesters' status as legislators authorizes the DCCA to nevertheless release this information under section 92F-19(a)(6), Hawaii Revised Statutes.

DISCUSSION

The UIPA, the State's new public records law, generally provides that "[a]ll government records are open to public inspection unless access is closed or restricted by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1989). In addition to this general rule of agency disclosure, in section 92F-12, Hawaii Revised Statutes, the Legislature set forth a list of records (or categories of records) which it declared shall be disclosed "as a matter of public policy." S. Conf. Comm. Rep. No. 235, 14th Leg. 1988 Reg. Sess., Haw. S.J. 689, 690 (1988). With respect to those granted licenses or permits by an agency, section 92F-12(a)(13), Hawaii Revised Statutes, states:

. **92F-12 Disclosure required.** (a) Any provision to the contrary notwithstanding each agency shall make available for public inspection and duplication during regular business hours:

. . . .

(13) Rosters of persons holding licenses or permits granted by an agency which may include name, business address, type of license held, and status of the license;

Consistent with the above provisions, the DCCA disclosed to the two legislators the name, business address, type of license held, and the status of the license of the pertinent massage therapist and massage establishment.

As to whether the DCCA must disclose the home address, home telephone number, and date of birth of the licensee's "principal massage therapist," it is necessary to consult section 92F-13(1), Hawaii Revised Statutes, which provides that an agency shall not be required by the UIPA to disclose "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." In

determining whether the disclosure of a government record would result in such an invasion of privacy, the UIPA declares:

. **92F-14 Clearly unwarranted invasion of personal privacy.** (a) Disclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual.

Haw. Rev. Stat. . 92F-14(a) (Supp. 1989).

Further, in enacting the UIPA, the Legislature provided examples of government records in which an individual¹ has a significant privacy interest. Among other things, section 92F-14(b), Hawaii Revised Statutes, declares that:

(b) The following are examples of information in which the individual has a significant privacy interest:

. . . .

(7) Information compiled as part of an inquiry into an individual's fitness to be granted or to retain a license, except:

(A) The record of any proceeding resulting in the discipline of a licensee and the grounds for discipline;

(B) Information on the current place of employment and required insurance coverages of licensees; and

(C) The record of complaints including all dispositions; [Emphasis added.]

The home address, telephone number, and date of birth of those individuals granted a license by the DCCA might arguably

¹ Only "natural persons" have privacy interests protectable under section 92F-13(1), Hawaii Revised Statutes. See Haw. Rev. Stat. . 92F-3 (Supp. 1989).

be information "compiled as part of an inquiry into an individual's fitness to be granted a license." Regardless, in previous advisory opinion letters, the OIP concluded that the disclosure of those portions of government records containing an individual's home address, home telephone number, and date of birth, would generally "constitute a clearly unwarranted invasion of personal privacy," under section 92F-13(1), Hawaii Revised Statutes. See OIP Op. Ltr. No. 89-4 (Nov. 9, 1989) (home address); OIP Op. Ltr. No. 89-16 (Dec. 27, 1989) (home address and home telephone number); OIP Op. Ltr. No. 90-7 (Feb. 9, 1990) (date of birth). Although in a given case, the public interest in disclosure of this information may outweigh an individual's significant privacy interest in such data, such an interest is not present here as disclosure of this information would say little, if anything, about the conduct of the DCCA or about "what the government is up to." Under these circumstances the "public interest" in disclosure is not significant. See OIP Opinion Letter No. 89-16 (Dec. 27, 1989), for a further discussion of the "public interest" to be considered in determining whether a given disclosure would constitute a clearly unwarranted invasion of personal privacy.

Thus, we conclude that under these circumstances, the disclosure of the home address, home telephone number, and date of birth of a licensee, as contained in a license application, would constitute a "clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes.

We must now examine whether the requester's status as a legislator entitles such a person to any greater right of access to confidential government records under part II of the UIPA. Section 92F-19, Hawaii Revised Statutes, sets forth the circumstances under which an agency may disclose to other agencies, government records that are protected from disclosure under section 92F-13, Hawaii Revised Statutes. This section provides in pertinent part:

.92F-19 Limitations on disclosure of government records to other agencies. (a) No agency may disclose or authorize disclosure of government records to any other agency unless the disclosure is:

. . . .

(6) To the legislature or any committee or subcommittee thereof;

Haw. Rev. Stat. . 92F-19(a)(6) (Supp. 1989). Further, even when receiving government records pursuant to subsection 92F-19(a), an agency "shall be subject to the same restrictions on disclosure of the records as the originating agency." Haw. Rev. Stat. . 92F-19(b).

The language of section 92F-19, Hawaii Revised Statutes, is nearly identical to its predecessor, section 92E-5(6), Hawaii Revised Statutes, which was repealed by the adoption of the UIPA.² With regard to access to information by the Legislature pursuant to section 92E-5(6), Hawaii Revised Statutes, the Governor's Committee on Public Records and Privacy made the following observations:

Under the current provisions of Chapter 92E, the Legislature is entitled to obtain information which is not public. The limits of this authority have never been tested, but the Honolulu Corporation Counsel has taken the view that this does not apply to legislators as individuals but rather is an authority that flows from the full Legislature or from committees. In this context, it should be noted that section 84-12, HRS, prohibits legislators from making any personal use of information acquired by virtue of their official position.

This authority has not been the subject of significant dispute but to the extent that highly personal material is sought, this is a potential area for further debate.

² Section 92E-5(6), Hawaii Revised Statutes, provided as follows:

. 92E-5 Limitations on disclosure of personal record to other agencies. No agency may disclose or authorize disclosure of personal record to any other agency unless the disclosure is:

.

(6) To the legislature of any committee or subcommittee thereof;

Vol. I Report of the Governor's Committee on Public Records and Privacy 100 (1987) (emphasis added).

Section 92F-19(a)(6), Hawaii Revised Statutes, is also similar to Exemption (b)(9) of the Federal Privacy Act of 1974, 5 U.S.C. . 552a ("Privacy Act"). Under the Privacy Act, federal agencies are prohibited from disclosing certain records pertaining to individuals, unless the disclosure is sanctioned by one of twelve exemptions. 5 U.S.C. . 552a(b)(9) (Supp. 1989) provides in pertinent part:

(b) CONDITIONS OF DISCLOSURE.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

. . . .

(9)to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

The Ninth Circuit Court of Appeals recently considered the application of Exemption (b)(9) of the Privacy Act in Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989). In Swenson, a U.S. Postal employee brought suit against the U.S. Postal Service, alleging that it had violated the Privacy Act by disclosing certain personnel information to her congressman after she wrote to the congressman calling for an investigation of improper conduct by her postmaster. The United States District Court for the Eastern District of California concluded that the disclosure of the plaintiff's personnel data to her congressman was authorized by 5 U.S.C. . 552a(b)(9) (Supp. 1989), and therefore entered summary judgment upon the postal employee's claim. On appeal, the Ninth Circuit concluded that the trial court's decision was erroneous, reasoning:

The clear language of the Privacy Act exemption . . . applies only to a house of congress or a committee or subcommittee, not to individual congressmen.

Swenson, 890 F.2d at 1077. The court, rejecting other rationales advanced by the Postal Service, therefore reversed and remanded the trial court's decision granting summary judgment in favor of the Postal Service.

Similarly, the Legislative History of the Privacy Act of 1974 ("Source Book") prepared jointly by the Senate Committee on Government Operations and the Subcommittee on Government Information and Individual Rights of the House Committee on Government Operations, indicates that Exemption (b)(9) does not authorize disclosure of a government record to members of Congress when acting in their individual capacities. See 70 Fed. Reg. 28, 955 (1975), reprinted in Source Book at 1040.

We find the decision in Swenson, and the legislative history of similar provisions of the Privacy Act to be persuasive and based upon common sense. Further, like exemptions to the Privacy Act, the provisions of section 92F-19, Hawaii Revised Statutes, must be narrowly construed to effectuate the UIPA's purpose to "[m]ake government accountable to individuals in the collection, use, and dissemination of information relating to them." Haw. Rev. Stat. . 92F-2 (Supp. 1989). See also, Londrigan v. FBI, 670 F.2d 1164, 1170 (D.C. Cir. 1981).

Accordingly, we conclude that under section 92F-19(a)(6), Hawaii Revised Statutes, the disclosure of a government record which is protected from disclosure under part II of the UIPA, is only proper when the disclosure is to the Legislature or any committee or subcommittee when acting as a whole. On the contrary, section 92F-19(a)(6), Hawaii Revised Statutes, does not sanction the disclosure of government records to legislators when acting in their individual capacities. In order to apply this principle, we would suggest that legislators making requests under section 92F-19(a)(6), Hawaii Revised Statutes, indicate how the requested government records relate to the consideration of matters before the Legislature or committees thereof. Lastly, we observe that section 92F-19(a)(6), Hawaii Revised Statutes, does not require, but merely authorizes, the disclosure of government records to legislative bodies. However, under the UIPA, an agency must disclose "[g]overnment records pursuant to a subpoena from either house of the state legislature." Haw. Rev. Stat. . 92F-12(b)(5) (Supp. 1989).

CONCLUSION

The disclosure of portions of government records containing an individual licensee's or license applicant's home address, home telephone number, and date of birth would "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Based upon previous OIP advisory opinions, individuals have a significant privacy interest in this information and the disclosure of same would say little, if anything, concerning what the government is up to or upon the conduct of public officials. Under these circumstances, therefore, an individual's privacy interest in such information is not outweighed by the public interest in disclosure.

Further, based upon the legislative history of similar provisions of the Privacy Act and case law interpreting same, we conclude that section 92F-19(a)(6), Hawaii Revised Statutes, does not authorize the disclosure of government records to legislators when acting in their individual capacities. Rather, this section permits disclosure of government records to the Legislature or committees thereof, in connection with the transaction of business before those bodies when acting as a whole.

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APPROVED:

Kathleen A. Callaghan
Director